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May 17, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 3, 2004

Case No.: TIA-0306

XXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

#### *B. Procedural Background*

The Worker was employed as a janitor and a laborer at the Savannah River Site (the plant). He worked at the plant approximately 9 years, from 1956 to 1957 and again from 1960 to 1968.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's acute myelomonocytic leukemia (AML). The Applicant claimed that the Worker's condition was due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. NIOSH issued a report which established a probability of causation of less than 50 percent.

The Physician Panel rendered a negative determination for the claimed illness. The Panel stated that (i) the Worker had low dosimetry readings, (ii) the Worker had normal blood counts during his employment at the plant with no benzene hematotoxicity, and (iii) the latency period between benzene exposure and AML is usually 9 to 15 years, less than the 34 years between the Worker's exposure and his AML. See Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant maintains that the Worker's physician stated that some type of toxic exposure caused the AML. See Applicant's Appeal Letter.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that the Worker's physician attributed his AML to some type of toxic exposure does not indicate Panel error. The Panel's determination that radiation exposure was not a factor is consistent with the NIOSH dose reconstruction, and the Panel explained the basis for its rejection of benzene exposure as a factor. The statement of the Worker's physician that some type of toxic exposure caused the AML, even if correct, does not mean that the exposure occurred at DOE and is ultimately a disagreement with the Panel's medical opinion, rather than an indication of Panel error.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0306, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 17, 2005